No. 93-1070

Supreme Court, U.S.
FILED
MAR 14 1994
OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1993

BOB SKIPPER, SHERIFF OF
MULTNOMAH COUNTY,

Petitioner,

v.

KIM REUTER,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

SANFORD JAY ROSEN
Counsel of Record
THOMAS NOLAN
ROSEN, BIEN & ASARO
155 Montgomery Street, 8th Floor
San Francisco, California 94104
Telephone: (415) 433-6830

SPENCER M. NEAL
GINSBURG & NEAL
500 Yamhill Plaza Building
815 S.W. Second Avenue
Portland, Oregon 97204
Telephone: (501) 221-1792

Attorneys for Respondent

QUESTION PRESENTED FOR REVIEW

May a defendant County official invoke the anti-injunction provisions of the Norris-LaGuardia Act to deny a public sector employee the 42 U.S.C. § 1983 remedy of a "temporary" injunction to maintain the *status quo* in a lawsuit challenging a violation of constitutional rights?

PARTIES TO THE PROCEEDINGS BELOW

The Petitioner (Defendant-Appellant in the Ninth Circuit) is Bob Skipper, in his official capacity as the elected Sheriff of Multnomah County, Oregon.

The Respondent (Plaintiff-Appellee in the Ninth Circuit) is Kim Reuter.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

RELEVANT STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS WHY THE PETITION SHOULD BE DENIED 6

Introduction 6

I. THE COURT SHOULD DENY THE PETITION BECAUSE THE ISSUE PRESENTED IS NOW MOOT AND HAS BEEN ABANDONED. 7

TABLE OF CONTENTS

Page

II. THE COURT SHOULD DENY THE PETITION BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS AND THE CASE RAISES NO IMPORTANT UNRESOLVED AND RECURRING QUESTIONS OF FEDERAL LAW 11

III. THE COURT SHOULD DENY THE PETITION BECAUSE THE NINTH CIRCUIT DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT 13

IV. THE COURT SHOULD DENY THE PETITION BECAUSE THE DECISION BELOW DOES NOT IMPLICATE THE POLICY FAVORING ARBITRATION, RESPECTS THE PRINCIPLE THAT SECTION 1983 PLAINTIFFS NEED NOT EXHAUST OTHER REMEDIES PRIOR TO SUIT, AND WILL NOT ENCOURAGE OR INCREASE LITIGATION IN FEDERAL COURTS. 24

CONCLUSION 27

TABLE OF AUTHORITIES

CASES

Page

Alexander v. Gardner-Denver,
415 U.S. 36 (1974) 24, 25

Anderson v. Edwards,
505 F.Supp. 1043 (S.D. Ala. 1981) 12

Bowman v. Township of Pennsauken,
709 F.Supp. 1329 (D.N.J. 1989) 12

Brookens v. White,
795 F.2d 178 (D.C. Cir. 1986) 11

Brotherhood of Railroad Trainmen v. Howard,
343 U.S. 768 (1952) 12, 22

C.A. May Marine Supply Company v. Brunswick Corporation,
649 F.2d 1049 (5th Cir.),
cert. denied, 454 U.S. 1125 (1981) 10

Casella v. Webb,
883 F.2d 805 (9th Cir. 1989) 10

Certified Grocers of Illinois, Inc. v. Produce Etc. Union, Local 703,
816 F.2d 329 (7th Cir. 1987) 8, 9

Collins v. Harker Heights, Texas,
504 U.S. ___, 117 L.Ed.2d 261 (1992) . 15, 24

Cone Corp. v. Hillsborough County,
908 F.2d 908 (11th Cir.),
cert. denied, 498 U.S. 983 (1990) 8

Continental Training Services, Inc. v. Cavazos,
893 F.2d 877 (7th Cir. 1990) 8

Dandridge v. Williams,
397 U.S. 471 (1970) 17

Dayton Board of Education v. Brinkman,
433 U.S. 406 (1977) 17

Denholm v. Houghton Mifflin,
912 F.2d 357 (9th Cir. 1990),
cert. denied, ___ U.S. ___,
115 L.Ed.2d 986 (1991) 10

Dennis v. Higgins,
498 U.S. 439 (1991) 13

Director, Division of Employment Relations v. Labor Relations Commission,
346 N.E.2d 852 (Mass. 1976) 18, 19

Felder v. Casey,
487 U.S. 131 (1988) 26

Gilmer v. Interstate/Jahnson Lane,
500 U.S. 20 (1991) 25

Golden State Transit Corp. v. Los Angeles,
493 U.S. 103 (1989) 8, 13

Graham v. Brotherhood of Locomotive Firemen & Enginemen,
338 U.S. 232 (1949) 12, 22, 23

Lake Michigan College Federation of Teachers v. Lake Michigan Community College,
390 F.Supp. 103 (W.D. Mich. 1974),
rev'd on other grounds,
518 F.2d 1091 (6th Cir. 1975) 11, 20

Mitchum v. Foster,
407 U.S. 225 (1972) 13

Monell v. New York City Dept. of Social Services,
436 U.S. 658 (1978) 13

Monroe v. Pape,
365 U.S. 167 (1961) 14, 26

New York State Nat. Organization for Women v. Terry,
886 F.2d 1339 (2nd Cir. 1989),
cert. denied, 495 U.S. 947 (1990) 7

Patsy v. Board of Regents,
457 U.S. 496 (1982) 26

Reuter v. Skipper,
4 F.3d 716 (9th Cir. 1993) . . . . . *passim*

Roberts v. College of the Desert,
870 F.2d 1411 (9th Cir. 1988) 10

Securities and Exchange Comm'n v. First Financial Group of Texas,
645 F.2d 429 (5th Cir. 1981) 8

Singleton v. Wulff,
428 U.S. 106 (1976) 11

Smith v. Illinois Bell,
270 U.S. 587 (1926) 8

Stacy G v. Pasadena Independent School District,
695 F.2d 949 (5th Cir. 1983) 9

Syres v. Oil Workers International Union,
350 U.S. 892 (1955) 22

Textile Workers Union v. Lincoln Mills,
353 U.S. 448 (1957) 21, 24

United States v. City of Chicago,
534 F.2d 708 (7th Cir. 1976) 8

United States v. Local 30,
871 F.2d 401 (3rd Cir.),
cert. denied, 493 U.S. 953 (1989) 8

United States v. United Mine Workers,
330 U.S. 258 (1947) . . . . . *passim*

United States v. W.T. Grant Co.,
345 U.S. 629 (1953) 11

Virginia Railway Co v. System Federation, R.E.D.,
300 U.S. 515 (1937) 22

Weinstein v. Bradford,
423 U.S. 147 (1975) 11

STATUTES

28 U.S.C. Section 1254(1) 2, 9

28 U.S.C. Section 2283 14

Norris-LaGuardia Act,
29 U.S.C. Section 101 *et seq.* . . . . . *passim*

42 U.S.C. Section 1983 . . . . . *passim*

Labor Management Relations Act of 1947,
29 U.S.C. Section 185 21

LAW REVIEW ARTICLES

Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 Mich. L.R. 943 (1961) . . . . . 19.

Note, *The New Federal Law of Labor Injunctions*, 79 Yale L.J. 1593 (1970) 16

No. 93-1070

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

BOB SKIPPER, SHERIFF OF MULTNOMAH COUNTY,

Petitioner,

v.

KIM REUTER,

Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit, as amended, is reported as *Reuter v. Skipper*, 4 F.3d 716 (9th Cir. 1993), and can also be found as Appendix A to the Petition for Writ of Certiorari.

The District Court's February 8, 1993 Order granting Plaintiff's (Respondent's) motion for a preliminary

injunction is not reported. A copy of the Order is attached as Appendix C to the Petition for Writ of Certiorari.

A copy of the Ninth Circuit Court of Appeal's October 27, 1993 Order denying the County Sheriff's Petition for Rehearing and Suggestion of Rehearing *En Banc* is attached as Appendix B to the Petition for Writ of Certiorari.

The District Court's August 24, 1993 Order, granting Respondent's motion for partial summary judgment, is also not reported. A copy of the Order is attached to this Brief in Opposition in the Appendix at A-1. A copy of the District Court's August 24, 1993 unreported opinion is attached to this Brief in Opposition in the Appendix at A-2 to A-15. A copy of the District Court's October 12, 1993 Declaratory Judgment and Permanent Injunction, enjoining petitioner from enforcing the work rule at issue in this case is attached to this Brief in Opposition in the Appendix at A-16 to A-17.

JURISDICTION

Petitioner invokes this Court's *certiorari* jurisdiction under 28 U.S.C. § 1254(1). Respondent does not dispute the Petition's timeliness. However, as set forth below, Respondent contends the issue is both moot and abandoned.

RELEVANT STATUTORY PROVISIONS

Respondent adopts Petitioner's statement of Relevant Statutory Provisions.

STATEMENT OF THE CASE

Respondent Kim Reuter ("Reuter" or "Respondent") is currently employed as a corrections officer with the Multnomah County Sheriff's Office, a position she has held for more than seven years. (Ninth Circuit Excerpt of Record ["ER"] 13).

In the Fall of 1991, Ms. Reuter began dating a man. During the course of the relationship, Reuter learned that the man had at one time been an inmate in another state. (ER 14, 36, 37). Reuter was aware that under the work rules of the sheriff's office in effect at that time, she was required to report her intimate association with *any* "ex-inmate" to her supervisors. Reuter did so, at first orally and then in writing in a report dated October 18, 1991. (ER 14).

Following her October 1991 report, a member of the sheriff's office investigated Reuter's relationship. (ER 14). Reuter was not told to terminate the relationship. She also was not then subjected to discipline of any kind. (ER 14). She requested that if there was a problem with her relationship, she be informed in writing to that effect. (ER 14). As no such writing was given to her, Reuter assumed that her association with the ex-inmate was not prohibited. (ER 14).

In October 1992, after the relationship had deepened in importance, it was once again investigated by the sheriff's office. (ER 15). On October 20, 1992, Reuter was summarily suspended with pay from her employment at the sheriff's office because of the relationship. (ER 15). On December 17, 1992, Reuter met with the Facilities Division Commander, who advised her that, in light of her intention to continue her relationship, he was going to recommend that her employment with the Sheriff's office

be terminated. (ER 16). He also gave Ms. Reuter the impression that if she stopped associating with her domestic partner, he would recommend that she not be terminated. (ER 16).

Respondent brought suit under 42 U.S.C. § 1983 seeking declarations (1) that her intimate association is protected by the First Amendment to the United States Constitution, and (2) that the work rule barring such associations is constitutionally overbroad. Respondent also sought a temporary restraining order, a preliminary injunction, and a permanent injunction restraining defendant from terminating her employment as a correctional officer. (ER 11).

The district court issued a temporary restraining order. After a hearing, the district court issued a preliminary injunction preventing the County from firing Reuter pending the outcome of her section 1983 action.

The County sheriff appealed, arguing only that the Norris-LaGuardia Act (sometimes "the Act") divested the district court of jurisdiction to issue a preliminary injunction. The sheriff did not argue that the work rule was constitutional or offer any alternative grounds for his assertion that a preliminary injunction was inappropriate.

Before the Ninth Circuit, Reuter argued (1) that her impending termination was not a "labor dispute" under the Act; (2) that the Act did not apply because the County was not a "person participating or interested in a labor dispute," covered by the Act, 29 U.S.C. §113(b); (3) that the Act was enacted to address problems between private employers and their employees and does not apply in the public employment context; and (4) that 42 U.S.C. § 1983, the Civil Rights Act of 1871, as amended, which only applies to persons acting under color of state law, grants to the

district court the power to issue an injunction in order to protect plaintiff's constitutional rights, a power that must be accommodated despite Norris-LaGuardia.

On August 27, 1993, the Ninth Circuit sustained the preliminary injunction, holding that section 1983 injunctions are part of a narrow category of exceptions to the Norris-LaGuardia Act's anti-injunction proscriptions. Pet. App. at A-10 to A-11; *Reuter v. Skipper*, 4 F.3d 716, 719-720 (9th Cir. 1993). In the decision, the panel rejected Respondent's first two arguments (that the impending termination was not a "labor dispute" under the Act and that the County was not a "person" under the Act). However, the panel ruled that "Reuter's section 1983 action falls into the limited category of statutes exempted from the anti-injunction provisions of Norris-LaGuardia." Pet. App. at A-11, 4 F.3d at 720.

Petitioner's timely Petition for Rehearing/Suggestion for Rehearing *En Banc* was denied on October 27, 1993, with the panel of judges voting to deny it and no active judge requesting a vote. Pet. App. at B-1.

On August 24, 1993, the district court issued an order and opinion granting Reuter's motion for partial summary judgment. *See* App. hereto at A-1 to A-15, *infra*. On October 12, 1993, the district court dissolved the preliminary injunction by issuing a declaratory judgment and permanent injunction barring the County from firing Reuter as a result of her intimate association and from otherwise enforcing the work rule under which Reuter had initially been suspended. *See* App. hereto at A-16 to A-17, *infra*.

On September 23, 1993, Petitioner filed a new appeal, this time from the August 24, 1993 Order. Ms. Reuter's brief as appellee in the second appeal is about to

be filed in the Court of Appeals. No Notice of Appeal was filed after or from the October 12, 1993 declaratory judgment and permanent injunction.

REASONS WHY THE PETITION SHOULD BE DENIED

Introduction

There is no reason for the Court to review the issue presented here. First, since the preliminary injunction is no longer in place, and since Petitioner has not appealed from the October 12, 1993 permanent injunction, or even raised the Norris-LaGuardia issue in his appeal from the district court's August 24, 1993 partial summary judgment Order, the issue presented in this appeal is now moot and has been abandoned by Petitioner.

Second, no conflict with any of this Court's decisions is direct and readily apparent from the Ninth Circuit rationale or result. Nor is there any conflict between the Ninth Circuit's decision and the decisions of any other circuit. Indeed, the few reported decisions on this subject are district court decisions, all of which are in accord with the Ninth Circuit's decision here.

Third, this case does not raise an important recurring question of federal law that has not been but ought to be resolved by this Court. The scant number of reported decisions demonstrates the extreme rarity of the issue.

Fourth, as shown herein, the issues involved do not play out in an otherwise significant way. Petitioner engages an imaginative attempt to invoke the broad anti-injunction provisions of the Norris-LaGuardia act to deny certain equitable remedies to public employees who assert precious constitutional rights against municipalities pursuant

to 42 U.S.C. § 1983. However, this case is only about the range of remedies available to such section 1983 litigants -- not about the viability of public sector employees' section 1983 claims. For that reason, and others discussed below, the case does not meaningfully implicate the judicial and social policy favoring the use of binding arbitration to settle labor disputes. Moreover, there is no exhaustion requirement in section 1983 cases; imposition of one in favor of arbitration is not appropriate.

I.

THE COURT SHOULD DENY THE PETITION BECAUSE THE ISSUE PRESENTED IS NOW MOOT AND HAS BEEN ABANDONED.

The preliminary injunction challenged in this appeal is no longer in place. Six weeks after the Ninth Circuit issued its opinion below, the preliminary injunction was dissolved and replaced by a permanent injunction, rendering the issue in the current proceeding moot. *See* District Court's October 12, 1993 Order, App. at A-16 to A-17, *infra*. Petitioner has not appealed from the permanent injunction, thus effectively abandoning the issue presented here.

It is well established that a "temporary" injunction is merged with an order granting a permanent injunction. *Smith v. Illinois Bell*, 270 U.S. 587, 588 (1926); *United States v. City of Chicago*, 534 F.2d 708, 711 (7th Cir. 1976). Following such merger any appeal from the preliminary injunction becomes moot and "appeal is only proper from the order granting the permanent injunction." *United States v. Local 30*, 871 F.2d 401, 403 (3rd Cir.), *cert. denied*, 493 U.S. 953 (1989); *New York State Nat'l*

Organization for Women v. Terry, 886 F.2d 1339, 1350 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990) ("the appealability of the district court's grant of a preliminary injunction is moot . . . because the district court subsequently granted a permanent injunction."); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 912 n.5 (11th Cir. 1990) (upon entry of a permanent injunction that supersedes a preliminary injunction, appeal from the preliminary injunction is properly dismissed); *Continental Training Servs., Inc. v. Cavazos*, 893 F.2d 877, 880 (7th Cir. 1990) (same); *Securities and Exchange Comm'n v. First Financial Group*, 645 F.2d 429, 433 (5th Cir. 1981) (once an order of permanent injunction is issued, the preliminary injunction merges with it and appeal may be had only from the order of permanent injunction).

Ordinarily, since the Norris-LaGuardia Act treats "temporary" and permanent injunctions identically, the issues raised in this appeal might have been thoroughly addressed in an appeal from the permanent injunction. However, the Petitioner has effectively abandoned the issues raised here by failing to appeal from the permanent injunction.

The reasoning of the court in *Certified Grocers of Illinois v. Produce Etc. Union, Local 703*, 816 F.2d 329 (7th Cir. 1987), is relevant here:

> If we were to vacate the preliminary injunction, nothing would happen; the permanent injunction would remain in force, beyond this court's power now that the time to appeal has expired. . . .
>
> The parties emphasized, in supplemental briefs filed at our request, that these

> two cases [holding that it is proper to dismiss appeals from preliminary injunctions that have merged into permanent injunctions] dealt with simultaneous appeals from preliminary and permanent injunctions, so that dismissal of the appeals from the preliminary injunctions left the court with something to review. True enough, but irrelevant. The holding of the cases is that only the permanent injunction matters, once it has been entered. The preliminary injunction no longer is the source of obligations; it cannot be reviewed, because it is gone. That is so whether or not anyone appeals from the permanent injunction. If the preliminary injunction is defunct, it is irrelevant and the appeal from it is not justiciable.

Id. at 330-31.

The possibility that "a 'merger' of the preliminary into the permanent injunction enables the court to consider the propriety of the permanent injunction without the filing of a fresh appeal," properly has been rejected on the ground that such an approach is inconsistent with "the principle that the notice of appeal must follow rather than precede the decree complained of." *Certified Grocers*, 816 F.2d at 331 (citing Fed. R. App. P. 4(a)(1) and *United States v. Hansen*, 795 F.2d 35, 37-38 (7th Cir. 1986)).

There are only limited grounds upon which a party may assert an exception to this rule. One is that an injunction bond may keep an appeal alive. *See, e.g., Stacy G. v. Pasadena Ind. Sch. Dist.*, 695 F.2d 949, 955 (5th Cir. 1983). However, there was no injunction bond in the instant case.

Petitioner has abandoned and cannot now raise the Norris-LaGuardia issue in this appeal. Even assuming that Petitioner's pending appeal in the Ninth Circuit will properly be deemed an appeal from the October 12, 1993 declaratory judgment and permanent injunction Order that followed Petitioner's September 22, 1993 Notice of Appeal, (*but see Certified Grocers, supra*), the Notice of Appeal here in no way identifies the Norris-LaGuardia issue. More significantly, Petitioner's docketing statement, executed September 29, 1993, identifies only two issues:

> 1. Whether sheriff's rule [*sic*], a basic rule of the organization, was presumptively valid, and entitled to rational basis scrutiny.
>
> 2. Whether the record shows a rational basis between [*sic*] rule and promotion of safety of persons and property.

Neither issue engages the Norris-LaGuardia Act. Finally, Petitioner's opening Brief in the merits appeal, dated February 7, 1994, also does not in any way raise the Norris-LaGuardia issue.

Under Ninth Circuit precedent, correctly interpreting Federal Rule of Appellate Procedure Rule 3(c), Respondent has now waived or abandoned the Norris-LaGuardia Act issue. *Casella v. Webb*, 883 F.2d 805, 807 n.2 (9th Cir. 1989) (issue not addressed by appeals court where not identified in or reasonably inferred from Notice of Appeal); *see C.A. May Marine Supply Company v. Brunswick Corp.*, 649 F.2d 1049, 1056 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981)); *see also Roberts v. College of the Desert*, 870 F.2d 1411, 1418-19 (9th Cir. 1988); *Denholm v. Houghton Mifflin*, 912 F.2d 357, 359 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 115 L.Ed.2d 986 (1991);

Brookens v. White, 795 F.2d 178, 180 (D.C. Cir. 1986). *Cf. Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

This case does not fall within the exception to the mootness doctrine that exists where a controversy is capable of repetition but likely to evade review. That doctrine only applies where there is a "reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). The lack of inferior court decisions on point suggests that disputes like the present one are rare. In any event, Petitioner has failed to present concrete evidence that the instant case is likely to be repeated, or otherwise to carry his obligation of demonstrating that "there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1952). *See also id.* ("[T]he moving party must satisfy the Court that relief is needed.")

II.

THE COURT SHOULD DENY THE PETITION BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS AND THE CASE RAISES NO IMPORTANT UNRESOLVED AND RECURRING QUESTIONS OF FEDERAL LAW.

There is no conflict among the circuits as to the issue raised in this case. Indeed, no other circuit court has considered this issue. The only decisions on point are district court decisions and all conclude, like the Ninth Circuit, that the Norris-LaGuardia Act is inapplicable in public employment section 1983 cases. *See Lake Michigan Coll. Fed. of Teachers v. Lake Michigan Community Coll.*,

390 F.Supp. 103, 135 (W.D. Mich. 1974) ("The court can find no evidence that Congress intended to apply the fourteenth Amendment to the states in every situation except public employment disputes in which injunctive relief is appropriate."), *rev'd on other grounds*, 518 F.2d 1091 (6th Cir. 1975); *Anderson v. Edwards*, 505 F.Supp. 1043, 1047 (S.D. Ala. 1981) ("the Norris-LaGuardia Act does not bar this court from entertaining the request which the firemen have filed to injunctive relief" regarding limitations on their right to freedom of speech); *Bowman v. Township of Pennsauken*, 709 F.Supp. 1329 (D.N.J. 1989) ("the Norris-LaGuardia Act is inapposite" because determination of federal constitutional rights not a labor dispute).

The lack of inferior court authority on this issue also demonstrates the extreme rarity of the circumstances in which it arises. It is hardly a recurring, important issue of federal law that has not been but ought to be decided by this Court. Moreover, as shown below, the Ninth Circuit's decision is consistent with this Court's decisions and will not disrupt the Norris-LaGuardia Act's anti-injunction policies or the national policy favoring arbitration. *See, e.g., Brotherhood of RT v. Howard*, 343 U.S. 768, 774 (1951); *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232, 239-40 (1949).

III.

THE COURT SHOULD DENY THE PETITION BECAUSE THE NINTH CIRCUIT DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT.

The Ninth Circuit's decision is fully consistent with this Court's previous decisions concerning 42 U.S.C.

§ 1983, its decisions concerning the Norris-LaGuardia Act, and its decisions reconciling the Norris-LaGuardia Act with other legislation.

This Court repeatedly has refused to narrow the broad scope of 42 U.S.C. § 1983. *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) ("A broad construction of § 1983 is compelled by the statutory language, which speaks of deprivations of '<u>any</u> rights, privileges, or immunities secured by the Constitution and laws.'") (emphasis added by *Dennis* Court); *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 105 (1989) ("the coverage of [§ 1983] must be broadly construed"); *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658, 684 (1978) (legislative history of § 1983, a remedial statute, should be "'liberally and beneficially construed'") (quoting Rep. Shellabarger, Cong Globe, 42 Cong, 1st Sess, App. 68 (1871)).

The historical background of section 1983 was succinctly summarized by this court in *Mitchum v. Foster*, 407 U.S. 225 (1972):

> Section 1983 was originally § 1 of the Civil Rights Act of 1871. 17 Stat 13. It was "modeled" on § 2 of the Civil Rights Act of 1866, 14 stat. 27 and was enacted for the express purpose of "enforc[ing] the provisions of the Fourteenth Amendment." 17 Stat. 13. The predecessor of § 1983 was thus an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment. As a result of the new structure of law that emerged in the post-Civil War era -- and especially of the Fourteenth Amendment, which was its

> centerpiece, the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established.

Id. at 238-39 (footnotes and citations omitted). This background underscores the importance of section 1983 as an independent source of federal remedies for constitutional violations. *See also Monroe v. Pape*, 365 U.S. 167 (1961) (reviewing legislative history of § 1983).

Mitchum is particularly apposite here, as it addressed the question of the federal court's jurisdiction in a section 1983 action to enjoin state court proceedings despite the anti-injunction statute, 28 U.S.C. § 2283, which enforced constitutional principles of state sovereignty implicated by the Eleventh Amendment. The Court held that in enacting section 1983:

> . . . Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.

Id. at 242.

As this Court observed in *Mitchum*, in adopting section 1983, Congress "interpose[d] the federal courts between the States and the people, as guardians of the people's federal rights . . . . In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in § 1983 actions, by expressly authorizing a 'suit in equity' as one of the means of redress." *Id.* at 242.

As the Court more recently recognized, the section 1983 cause of action extends fully to protect the constitutional rights of public employees within the employment relationship. In *Collins v. Harker Heights, Texas*, 504 U.S. ___, 117 L.Ed.2d 261 (1992), the Court stated:

> The employment relationship [ ] is not of controlling significance. . . . [A] logical application of the [Fifth Circuit's] holding might also bar potentially meritorious claims by employees if, for example, the city had given an employee a particularly dangerous assignment in retaliation for a political speech, . . . or because of his or her gender. . . . The First Amendment, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and other provisions of the Federal Constitution afford protection to employees who serve the government as well as to those who are served by them, and § 1983 provides a cause of action for all citizens injured by an abridgement of those protections.

Id., 117 L.Ed.2d at 269-70 (citations omitted).

The Norris-LaGuardia Act was enacted in 1932, sixty-one years after the passage of the predecessor to section 1983 and during the long period when section 1983 lay dormant prior to its revival by this Court in *Monroe* in 1961. Norris-LaGuardia was passed in response to years of judicial intervention in labor disputes that was widely perceived as biased and unfair. *See* The New Federal Law of Labor Injunctions, 79 Yale L.J. 1593, 1593-94 (1970).

Section 2 of the Norris-LaGuardia Act contains a statement of official policy to be followed "in the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States." That policy is as follows:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

29 U.S.C. § 102. This Court has looked to this statement of policy in determining the scope and application of the act. *See, e.g., United States v. United Mine Workers*, 330 U.S. 258, (1947) (sole decision of this Court that has

directly considered the application of the Norris-LaGuardia Act to the area of public employment).

In *United Mine Workers*, the Court reasoned that the general term "person" as used in the Act could not be applied to extend the Act to a sovereign government without express words to that effect in the statute. *Id.* at 272. Although the Ninth Circuit below rejected Respondent's argument that the County, like the federal government, is not a "person" under the Norris-LaGuardia Act, 4 F.3d 716, 719-20 (9th Cir. 1993), Pet. App. at A-10 (concluding that the County is a "body politic and corporate" and therefore falls within the definition of a "person" under the Act), this issue, as well as the issue of whether or not this dispute is properly treated as a "labor dispute" within the meaning of the Norris-LaGuardia Act, might well have to be revisited if this Court granted the writ of certiorari. *See Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1976) ("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment. . . . It is likewise settled that appellee may, without taking a cross appeal, urge in support of a decree any matter, although his argument may involve an attack upon the reasoning of the lower court."); *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419 (1977).

In any event, this Court's reasoning in *United Mine Workers* remains relevant here because the Court's extensive review of the history and purpose of the Norris-LaGuardia Act in fact forces the Ninth Circuit panel's ultimate holding that Respondent's section 1983 action is excepted from the Act.

In *United Mine Workers* the Court reasoned that the purposes section of the Act:

> . . . predicates the purpose of the Act on the contrast between the position of the "individual unorganized worker" and that of the "owners of property" who have been permitted to "organize in the corporate and other forms of ownership association," and on the consequent helplessness of the worker. . . . These considerations, on their face, obviously do not apply to the Government as an employer and to the relationship between the Government and its employees.

United Mine Workers, 330 U.S. at 274. Such considerations also do not apply in the context of County government employment.

At the time the Norris-LaGuardia Act was passed in 1932, Congress was concerned about the judicial use of injunctions to defeat strikes. At the time Congress' concern was with strikes only in the private sector, as public employees were generally barred from striking and were the subject of state regulation. Almost certainly, therefore, Congress did not envision the application of the Act in the public employment area.

In *Director, Division of Employment Relations v. Labor Relations Commission*, 346 N.E.2d 852 (Mass. 1976), a state "Little Norris-LaGuardia Act" case, the Supreme Judicial Court of Massachusetts correctly explained:

> basic differences between labor relations in the private and public sectors. Whereas the strike has been a protected weapon of private-sector employees since the 1930's, public employees have not had similar artillery . . . a distinction rationalized and

> justified on many grounds. . . . Thus, although in the private sector a union's contractual waiver of its statutory right to strike may be presumptively tied to the employer's acceptance of binding arbitration for resolution of contractual disputes . . . , no similar linkage exists in public sector cases.

Id. at 859 (citations and footnotes omitted); *see also*, Anderson, "Strikes and Impasse Resolution in Public Employment," 67 Mich. L.R. 943, 951 (1961) ("[F]ederal law protects the right to strike in private employment, while public employment disputes are a matter for state regulation.").

The procedural requirements of the Norris-LaGuardia Act underscore this lack of Congressional intent to apply the Act to the public sector employment. For example, section 7 sets forth strict procedural rules for issuing injunctions in those situations where the Act does not bar them altogether. That section requires that before issuing an injunction, a court give notice to "the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property." 29 U.S.C. § 107. The same section requires a finding that "the public officers charged with the duty to protect complainants' property are unable or unwilling to furnish adequate protection." *Id.* Such provisions contemplate a situation such as a strike or other labor action where violence is threatened, and do not encompass a situation where the public officer charged with duty to protect complainant's property is also the defendant in the suit. *See United Mine Workers*, 330 U.S. at 276 (If the coercive power of the federal government were ineffective to protect the property of the government, then an injunction would

be "meaningless form" since it would have to be enforced by the same coercive power).

The Court in *United Mine Workers*, 330 U.S. at 275-276, also looked at the language of §13 (a) and (b) of the Act, and concluded:

> Every one of these qualifications in § 13(a) and (b) we think relates to an economic role ordinarily filled by a private individual or corporation, and not by a sovereign government. None of them is at all suggestive of any part played by the United States in its relations with its own employees.

Id. at 275-76. After further review of the legislative history, the Court ultimately decided that "the Norris-LaGuardia Act did not affect the jurisdiction of the Courts to issue injunctions when sought by the United States in a labor dispute with its own employees." *Id.* at 282.

The Court's rationales apply equally well in the local government context. *See Lake Michigan College Federation of Teachers v. Lake Michigan Community College*, 390 F.Supp. 103, 135 (W.D. Mich. 1974) ("Although United Mine Workers applied specifically to the federal government, many of the same elements of statutory language and legislative history indicate just as clearly that the Act was also not intended to extend to public employment situations on the state and local level.")

Although no other Supreme Court case has addressed the application of the Norris-LaGuardia Act to the public employment sector, there are a number of occasions when the Court has been required to accommodate Norris-LaGuardia to other statutes.

Of these, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), is particularly instructive because it required this Court to accommodate the Norris-LaGuardia Act with another broad remedial act, the Labor Management Relations Act of 1947. Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. 185, amending the National Labor Relations Act, is similar to 42 U.S.C. § 1983 in that both are broad remedial statutes that allow for both monetary and injunctive relief.

In *Lincoln Mills*, a union had moved for an injunction to compel an employer to arbitrate, and the employer invoked the Norris-LaGuardia Act to block the injunction. The Court rejected the employer's interpretation of the scope of the Norris-LaGuardia Act, reasoning that:

> The question remains whether jurisdiction to compel arbitration of grievance disputes is withdrawn by the Norris-LaGuardia Act, 47 Stat 70, 29 U.S.C. § 101. Section 7 of that Act prescribes stiff procedural requirements for issuing an injunction in a labor dispute. The kinds of acts which had given rise to abuse of power to enjoin are listed in § 4. The failure to arbitrate was not part and parcel of the abuses against which the Act was aimed. . . . Though a literal reading might bring the dispute within the terms of the Act, . . . we see no justification in policy for restricting § 301(a) to damage suits, leaving specific performance of a contract to arbitrate grievance to the inapposite procedural requirements of that Act. Moreover, we held in Virginia Railway Co. v. System Federation, R.E.D. 300 U.S. 515, 81 L ed 789, 57 S Ct 592, and in Graham v. Brotherhood of

> Locomotive Firemen & E. 338 US 232, 237, 94 L ed 22, 28, 70 S Ct 14, that the Norris-LaGuardia Act does not deprive federal courts of jurisdiction to compel compliance with the mandates of the Railway Labor Act. The mandates there involved concerned racial discrimination. Yet those decisions were not based on any peculiarities of the Railway Labor Act. We followed the same course in Syres v. Oil Workers International Union, 350 U.S. 892, 100 L ed 785, 76 S ct 152, which was governed by the National Labor Relations Act. There an injunction was sought against racial discrimination in application of a collective bargaining agreement; and we allowed the injunction to issue.

Id. at 457-458.

These cases suggest that the Ninth Circuit was entirely correct here in identifying section 1983 actions as one of "narrow band of labor disputes in which it is appropriate for a federal court to issue a labor injunction." Pet. App. at A-10, 4 F.3d at 719. Contrary to Petitioner's assertions, this narrow band is not limited to instances where the Court was encouraging arbitration. Pet. App. at 7-8. This Court has also recognized exceptions in cases involving racial discrimination. *See Brotherhood of R.T. v. Howard*, 343 U.S. 768, 774 (1951) ("the District Court has jurisdiction and power to issue necessary injunctive orders notwithstanding the provisions of the Norris-La-Guardia Act"); *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232, 239-40 (1949) ("Nor does the Norris-LaGuardia Act contain anything to suggest that it would deprive these Negro firemen of recourse to equitable relief from illegal discriminatory representation

by which there would be taken from them their seniority and ultimately their jobs. . . . If, in spite of the *Virginian, Steele and Tunstall* Cases (US) all *supra*, there remains any illusion that under the Norris-LaGuardia Act the federal courts are powerless to enforce these rights, we dispel it now.")

The exception sketched in these cases is also partly driven by an understanding that application of the Norris-LaGuardia Act would strip certain remedies from an otherwise broad remedial scheme without any logical purpose. The issues at stake on the merits of a section 1983 case are entirely congruent with those at stake in the race discrimination in employment cases which this Court repeatedly has acknowledged are excepted from the Norris-LaGuardia Act. Hence, as the Ninth Circuit correctly reasoned here, "it would be incongruous to read Norris-LaGuardia to preclude equitable relief as a remedy available to the injured party under section 1983 just because the parties are involved in a labor dispute." Pet. App. at A-11, 4 F.3d at 720.

IV.

THE COURT SHOULD DENY THE PETITION BECAUSE THE DECISION BELOW DOES NOT IMPLICATE THE POLICY FAVORING ARBITRATION, RESPECTS THE PRINCIPLE THAT SECTION 1983 PLAINTIFFS NEED NOT EXHAUST OTHER REMEDIES PRIOR TO SUIT, AND WILL NOT ENCOURAGE OR INCREASE LITIGATION IN FEDERAL COURTS.

Petitioner argues that, as a result of the Ninth Circuit's decision, "labor disputes, including discharges and discipline, that were formerly handled by grievance procedures and binding arbitration under labor agreements will now be decided in federal Courts." Pet. App. at 5. This is nonsense. This case involves a rarified constitutional dispute that happens to implicate a public employment relationship, not private-sector labor disputes that are the subject of national labor policy under statutes like the National Labor Relations Act and the Railway Labor Act that favor arbitration. As this Court recently reaffirmed in *Collins v. City of Harker Heights, Texas*, 504 U.S. ___, 117 L.Ed.2d 261 (1992), the public employment relationship engages constitutionally protected interests that are not implicated in the private employment relationship. Contrary to Petitioner's assertion, therefore, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), is inapposite.

Moreover, arbitration cannot be a final process and remedy in cases like the instant one involving constitutional rights. *See Alexander v. Gardner-Denver*, 415 U.S. 36, 59-60 (1974) (holding "that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommo-

dated by permitting an employee to pursue fully both fully both his remedy under the grievance arbitration clause of a collective bargaining agreement and his cause of action under Title VII.") *See also Gilmer v. Interstate/Jahnson Lane*, 500 U.S. 20 (1991) (holding that rationale of *Gardner-Denver* line of cases is confined to collective bargaining area because in those cases "an important concern was the tension between collective bargaining representation and individual statutory rights")

Significantly, as well, the collective bargaining agreement between the County of Multnomah, Oregon and the Multnomah County Corrections Officers Association does not purport to waive, or commit to the grievance and arbitration process, the constitutional rights of Multnomah County Corrections Officers such as Reuter. In fact, the agreement explicitly states that employees "shall not waive or be deprived of any constitutional or civil rights guaranteed by the Federal and state Constitutions and Laws afforded any citizen of the United States." (ER 50).

Even if the collective bargaining agreement between the County and the Officers Association contained an express provision ratifying the policy banning intimate relationships with ex-inmates, union acquiescence to such a provision would not in any way insulate the County policy at issue here from judicial scrutiny. Nor would it be deemed a waiver of an individual employee's section 1983 rights. *See Alexander v. Gardner-Denver Company*, 415 U.S. 36, 51 (1974) ("a union may waive certain statutory rights related to collective activity, such as the right to strike. . . . Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities.")

The irrelevance of the national labor policy favoring arbitration is made all the more clear by the fact that the issues Petitioner raises here concern only remedies, not the right to bring suit under section 1983. A ruling that the Norris-LaGuardia Act bars federal courts from issuing "temporary" injunctions in section 1983 cases would not discourage litigation of damage claims arising in these cases. Indeed, Petitioner admits that when labor disputes implicate constitutional rights, public sector employees can always "obtain equitable relief in the form of reinstatement and backpay, and damages and attorney fees in actions under 42 U.S.C. § 1983." *See* Pet. App. at 6. Hence application of the Norris-LaGuardia Act here would deny plaintiffs litigating these cases only a provisional remedy that preserves the *status quo ante* during litigation. No significant reduction in litigation would follow.

Finally, exhaustion of other remedies is not a precursor to section 1983 actions, rendering the national policy favoring arbitration all the more irrelevant. *Felder v. Casey*, 487 U.S. 131 (1988) (§ 1983 claims for relief "'exist independent of any other legal or administrative relief that may be available as a matter of federal or state law. They are judicially enforceable in the first instance.'") (quoting *Burnett v. Grattan*, 468 U.S. 42, 50 (1984)) (emphasis added by *Felder* Court); *See also Patsy v. Board of Regents*, 457 U.S. 496, 500 (1982); *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Writ of Certiorari.

Dated: March 14, 1994

Respectfully submitted

* SANFORD JAY ROSEN
THOMAS NOLAN
ROSEN, BIEN & ASARO
155 Montgomery Street, 8th Floor
San Francisco, California 94104
Telephone: (415) 433-6830

SPENCER M. NEAL
GINSBURG & NEAL
500 Yamhill Plaza Building
815 S.W. Second Avenue
Portland, Oregon 97204
Telephone: (501) 221-1792

* *Counsel of Record*

[filed August 24, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KIM REUTER,	)	
Plaintiff	)	Civil No. 92-1622-RE
vs.	)	
BOB SKIPPER,	)	O R D E R
Defendant.	)	
	)	

REDDEN, Judge:

Plaintiff's Motion for Partial Summary Judgment (doc. #32) is granted. Defendant's Response to Motion for Preliminary Injunction (doc. #11), which the court agreed to treat as a Motion for Summary Judgment, is denied.

A telephone status conference is set on August 30, 1993 at 1:15 p.m. The court will initiate the call. Please notify Ingrid Campbell at 326-6389 immediately if anyone other than Spencer Neal and Steven Nemirow will participate in the telephone conference.

IT IS SO ORDERED.

Dated this 23 day of August, 1993.

/ James A. Redden
United States District Judge

[filed August 24, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KIM REUTER, Plaintiff	)	Civil No. 92-1622-RE
vs.	)	
BOB SKIPPER, Defendant.	)	OPINION

Spencer M. Neal
Ginsburg & Neal
500 Yamhill Plaza Building
815 S.W. Second Avenue
Portland, Oregon 97204

Lisa M. LeSage
Ginsburg & Neal
A-150 Colonial Plaza Building
1049 S.W. Baseline
Hillsboro, Oregon 97123
Attorneys for plaintiff

Laurence Kressel
County Counsel for Multnomah County
Seven J. Nemirow
Assistant County Counsel
P.O. Box 849
Portland, Oregon 97207-0849
Attorneys for defendant

REDDEN, Judge:

PROCEDURAL BACKGROUND

Plaintiff, Kim Reuter, is a female corrections officer employed by Multnomah County. She was placed on paid administrative leave in October 1992 due to her personal association with a man who once had been confined in a correctional facility (an "ex-felon"). On December 17, 1992, she was informed by Major Slyter of the Multnomah County Sheriff's Office, that he would recommend her termination from County employment because of her association with the ex-felon. Plaintiff filed this lawsuit seeking a preliminary injunction to prohibit the county from firing her. She also sought a temporary restraining order (TRO) to prevent her firing at Christmas.

On November 24, 1992, this court granted plaintiff's motion for a TRO, restraining defendant, the Multnomah County Sheriff, from discharging plaintiff. Defendant stipulated to expansion of the TRO beyond ten days until the preliminary injunction hearing. Defendant then filed a Motion to Dissolve the TRO on January 11, 1993. This motion was subsumed in the motion for preliminary injunction.

FACTUAL BACKGROUND

Plaintiff brings this action pursuant to 42 U.S.C. § 1983 seeking declarations that (1) her association with the ex-felon is protected by the first amendment of the United States Constitution; and (2) that defendant's work rules are constitutionally overbroad. Plaintiff also seeks compensatory damages pursuant to 42 U.S.C. § 1983.

The Sheriff's Office has work rules covering its employees. Those rules were recently amended on November 20, 1992. The amended work rules provide, in part:

> Determining Prohibited Activities:
>
> (2) Presumptive Conflicts of Interest. A prohibited conflict of interest is presumed to exist where a member engages in an ongoing and continuous business, social or non-marital sexual relationship with another person when:
>
> . . .
>
> (b) the other person has been imprisoned for or convicted of a felony within the past ten years....
>
> (3) If a presumptive conflict of interest is shown to exist, the burden shall be upon the member to show their activity or relationship with the other person is unavoidable and would not endanger safety and security of Sheriff's Office operations or facilities, negatively impact the member's job performance, or create an unfavorable public perception of the Sheriff's Office.

Sheriff's Work Rules, W.100.110.07, as amended.

In the fall of 1991, plaintiff became involved with an ex-inmate who was convicted of a felony within the last ten years. Plaintiff alleges that when she learned of this person's status as an "ex-inmate," she orally reported this relationship to the Sheriff's Office and then filed a written report dated October 18, 1991. At the time that plaintiff began her relationship with the ex-felon, the sheriff's rules did not make her association with a person who was convicted of a felony within the past ten years a "presumptive conflict of interest."

In October 1992, plaintiff's relationship with the ex-inmate again became the subject of the Sheriff's Office

scrutiny and another investigation was undertaken. On October 20, 1992, plaintiff was suspended from her employment from the Sheriff's Office with pay. On December 17, 1992, plaintiff appeared before Major Slyter, Facilities Division Commander, who advised her that, in light of her expressed intention to continue her intimate association with an ex-felon, he would recommend that she be terminated from the Sheriff's Office. Slyter claimed that plaintiff's association with an ex-felon would create a potential compromise of the Sheriff's Office because of plaintiff's access to confidential records. In a letter dated Jan. 5, 1993, plaintiff was informed by John Schweitzer, Deputy Chief, Corrections Branch, that the allegations that she had violated the work rules were sustained and that her employment may be terminated.

Plaintiff alleges that defendant's conduct violates her right to associate in an intimate relationship in violation of the first amendment. Plaintiff also argues that defendant's conduct violates her right to privacy under the fourteenth amendment. Plaintiffs seeks redress for both of these alleged violations pursuant to 42 U.S.C. § 1983.

Plaintiff files a motion for partial summary judgment on the issue of liability. Defendant files a cross motion for summary judgment. Plaintiff's motion is granted.

STANDARDS

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The materiality of a fact is determined by the substantive law on the issue. T.W. Electrical

Service, Inc., v. Pacific Electrical Contractors Assoc., 809 F.2d 626, 630 (9th Cir. 1987). The authenticity of a dispute is determined by whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. Id. at 324.

Special rules of construction apply to evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. T.W. Electrical, 809 F.2d at 630.

DISCUSSION

1. Standard of Review

The first issue argued by the parties is the appropriate standard of review to be used by the court for evaluating defendant's rule. Defendant argues that it should be one of "rational basis." In that case defendant must show that the work rule has at least a "rational connection" to the promotion of safety of persons and property. See Kelley v. Johnson, 425 U.S. 238, 247 (1976).

Plaintiff contends that the standard is one of intermediate scrutiny. Intermediate scrutiny requires that governmental rules that restrict constitutional behavior

"need only be tailored in a reasonable manner to serve a substantial state interest . . . ." Edenfield v. Fane, ___ U.S. ___, 113 S. Ct. at 1798 (1993).

I agree with plaintiff that the standard of review in this case should be one of intermediate scrutiny. I find that a couple living together as husband and wife constitute a "family" in today's society and is therefore entitled to protection from the state's intrusions, judged at a higher level of standard of review. When the state intrudes into the family unit, its rules must be tailored in a reasonable manner to serve a substantial state interest. I find that the state's professed interest in maintaining the "security" of the Sheriff's Office is not tailored in a reasonable manner to serve that state interest.

2. Rational Relation

Moreover, even assuming that a couple living together as husband and wife do not qualify as a "family" and therefore are not entitled to the intermediate level of review, I find that defendant's evidence of the rule being rationally related to issues of public and officer safety and security is minimal. Defendant has failed to offer sufficient evidence to support his contention that the work rule of which plaintiff complains is rationally connected to defendant's duty of security and safety in its jails.

As noted above, defendant's first work rule prohibited various relationships outside of the professional context if they "would jeopardize any investigation, prosecution or would reflect unfavorably upon the integrity of the member, the Sheriff's Office, or Sheriff." Under this rule, there must be some showing of harm to defendant, either by compromising an investigation or prosecution, or by besmirching the reputation of the member or employee.

Defendant's current work rule, promulgated November 20, 1992, after plaintiff was disciplined for her off-the-job association with her domestic partner, has the same restrictions as the earlier rule quoted above. New guidelines, however, are added for determining whether a relationship is prohibited, as is a set of presumptive conflicts of interest. The current rule also provides:

> W1.100.110.09 Effect of Marriage of Involved Person The Sheriff recognizes a member's fundamental right to marriage and procreation. However, if a member knows or has a reasonable basis to know their prospective spouse is an involved person prior to marriage, the member's subsequent marriage to the involved person shall not, in and of itself, justify a relationship which otherwise would constitute a conflict of interest; nor shall the member's marriage to the involved person constitute a defense to a complaint against the member brought under this rule.

In Thorne v. City of El Segundo, 726 F.2d 459 (9th Cir. 1983), the court held that

> the City must show that its inquiry into appellant's sex life was justified by the legitimate interests of the police department, that the inquiry was narrowly tailored to meet those legitimate interests, and that the department's use of the information is obtained about appellant's sexual history was proper in light of the state's interests.

Id. at 469.

The court then held that the City failed to meet its burden:

> In the absence of any showing that private, off-duty, personal activities of the type protected by the constitutional guarantees of privacy and free association have an impact upon an appellant's on-the-job performance, and of specific policies with narrow implementing regulations, we hold that reliance on these private non-job-related considerations by the state in rejecting an applicant for employment violates the applicant's protected constitutional interests and cannot be upheld under any level of scrutiny.

Id. at 471. I find this standard appropriate here.

In Fugate v. Phoenix Civil Service Board, 791 F.2d 736 (9th Cir. 1986), the court reiterated the holding in Thorne, stating that because Thorne's "private, off-duty sexual activities were protected, and because the city could demonstrate no impact upon an applicant's on-the-job performance and failed to show specific policies with narrow implementing regulations, the City's rejection of Thorne for employment was impermissible." Id. at 740. The court then distinguished Thorne because the officers in Fugate engaged in sexual relations while on the job and the City of Phoenix demonstrated that the officers' "job performance was threatened by obvious conflicts of interest as well as by the possibility of blackmail." Id. at 741. Because of these distinctions, the court found that the protection of the right of privacy found in Thorne did not apply and the city only had to satisfy the rational basis test of Kelly v. Johnson, 425 U.S. 238 (1976).

Similarly, in Fleisher v. City of Signal Hill, 829 F.2d 1491 (9th Cir. 1987), a probationary police officer engaged in sexual conduct with a 15-year-old girl while both of them were Explorer Scouts with the police department. Id. at 1492. The police officer sued for damages

pursuant to 42 U.S.C. § 1983 alleging violation of his right of privacy. Id. The court held that the department did not violate Fleisher's right of privacy by terminating him. The court stated that this conduct was "illegal, [and] inappropriate in an individual who aspired to become an officer on the Department's police force, and detrimental to the Department as a whole. The illegality of Fleisher's behavior creates a substantial barrier to successfully asserting a privacy claim . . . ." Id. at 1498.

I find that plaintiff's situation is factually closer to Thorne rather than either Fugate or Fleisher. Plaintiff's intimate association with her domestic partner was only conducted off-duty and in private. Second, her private, off-duty sexual activities came to light only because she had to report them under the challenged work rule. Third, the Sheriff has made no showing that plaintiff's relationship with her domestic partner has had any impact on plaintiff's on-the-job performance, a showing that is required by Thorne, Fugate and Fleisher. Plaintiff alleges that the Sheriff has only raised speculative fears that the plaintiff is now untrustworthy because of her association with an ex-convict. Defendant's speculation is insufficient to meet the burden of proof that the Ninth Circuit has established. I further note an additional distinguished feature between plaintiff's case and the facts in Fugate and Fleisher; her intimate relationship with an ex-convict, even if her is presently married to another person, is not in any way prohibited by the laws of the State of Oregon, as were the relationships in Fleisher and Fugate.

Plaintiff also cites as evidence the statements of two correctional professionals, Allen Breed and James Harrigan. Breed states in his affidavit that he is unaware of any jurisdiction having a rule as broad as the one at issue here. It is his opinion that such a rule goes far beyond any

reasonable penological purpose and does not relate to the legitimate demands of the sheriff's office.

Harrigan is the legal counsel for the Sheriff of San Francisco. Its rules prohibit personal relationships between inmates and department employees. The rules do not, however, prohibit its employees from associating with persons away from the jail simply because those persons may have once been convicted of committing a crime. He is also unaware of any other sheriff's department that has a rule similar to the one at issue here.

Both experts stated that the rule was unworkable and not reasonably related to the needs of the Sheriff's Office.

The plaintiff next argues that defendant's rule also violates the state constitution which states, "Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice." Art. I, Sec. 15. I agree that terminating plaintiff's employment with the county simply because she is living with an ex-convict would continue to punish her domestic partner for a crime for which he has already paid his debt to society by penalizing his association with another.

The case relied on by defendant, Kukla v. Village of Antioch, 647 F. Supp. 799 (N.D. Ill. 1986), is distinguishable. There, a small village police department fired a sergeant and a dispatcher for living together as husband and wife without actually being married. The rule at issue there prohibited any socialization between employees of different ranks. The court found the small town size and small police force significant. There were only 16 employees on the entire force. The court held:

> If an Antioch sergeant developed a relationship with an Antioch patrolman or dispatcher, certain reactions are predictable, among them that other Antioch patrolmen or dispatchers would tiptoe lightly around certain subjects for fear of offending that sergeant. After all, in Antioch, offending one sergeant meant offending half of all the sergeants on the force. Given human nature, a belief that an intra-departmental relationship would negatively affect the department is more reasonable on a small force than a large one.

Id. at 810. The court noted that the Chicago police department would have a much more difficult task in justifying a discharge of a sergeant and a dispatcher for their off-duty living arrangements. Id. at 811. The court also relied upon the previous experience in the police department which "supported a belief in the likelihood of negative affects from such a relationship." Id. at 810. The court required that there be a factual predicate for the city's reasonable belief that the relationship would cause harm.

Kukla can be distinguished as follows: first, in Kukla, the police force was very small; therefore any intimate relationships between a sergeant and other officers would be obvious. In plaintiff's case, her relationship only came to light because she was required to report it. Second, in Kukla, the police department had problems in the past with supervisors dating subordinate officers because of the unwillingness of other officers to report mistakes for fear of alienating the sergeants. Here, defendant has no history of problems caused by a corrections officer living with an ex-convict. Defendant has produced no evidence that the mere association of an officer with someone who had once been convicted of a felony in another state has caused any problems in the

department. The court in Kukla required a reasonable basis for the city's rule. Here, the sheriff's rule lacks a reasonable basis.

I also find merit in plaintiff's argument regarding inconsistency with the rules that allow an employee with a family member in jail to visit and correspond with that family member "so long as the [employee] complies with the policies and procedures of the facility or program governing such conduct." W1.100.110.10.

Defendant's fear that plaintiff's relationship will cause her to compromise the safety and security of the jail is promised on the assumption that her relationship somehow creates a conflict of interest between her domestic partner and her official duties. Plaintiff points out that her domestic partner is not incarcerated so there is no occasion for a conflict of interest to arise.

Plaintiff relies on the deposition testimony of Sergeant Miller, an investigator with the Internal Affairs unit of the Multnomah County Sheriff's Office, and Chief Deputy Schweitzer, who is in charge of the corrections branch of the sheriff's office. Plaintiff argues that based on the testimony of these two officers that defendant's real reason for firing plaintiff was to achieve some consistency in the sheriff's discipline of correction officers. Sgt. Miller testified that there have been three female corrections officers who were suspended for being in relationships with ex-inmates. Chief Schweitzer testified that he had no evidence that the plaintiff's relationship with her domestic partner had caused any harm to the safety and security of any county jail facility, or that the relationship had caused any harm to her performance as a corrections officer, or that it has caused any harm to the public's perception of the Sheriff's Office.

Chief Schweitzer was questioned about his knowledge of the arrest and conviction of a corrections officer named Sgt. Asboe for "fraudulently obtaining drugs or narcotics." The officer was demoted (not fired) because "the determination was made that reduction in rank would suffice as a form of discipline in that case." Schweitzer admitted that there was a "possibility" that Asboe's conviction made him susceptible to blackmail or pressure by the inmates.

Defendant focuses on the fact that Troutdale Police officers saw plaintiff in her uniform, "kissing and hugging a known felon in front of a bar just four blocks from the Troutdale police station." Defendant's Opposition, p.2 Plaintiff responds that it has not been established that the public in general knew of the criminal record of plaintiff's domestic partner. Defendant submits only the affidavit of Troutdale Police Chief Collier, who claims that plaintiff's domestic partner is a known felon. Collier fails to state who knows this fact except his officers, and it is not even clear from the affidavit that his officers know this fact. Further, I note that plaintiff is not being disciplined for public displays of affection.

Defendant next claims that one of his lieutenants, Lt. Goss, informally interviewed plaintiff and warned her that this association could jeopardize her career. Plaintiff responds that the record is undisputed that after the 1991 investigation of her relationship, she was never ordered by anyone to terminate it. Plaintiff asserts that what defendant is now claiming to be a breach of security and professional ethics was insufficient to prompt any formal action from the Sheriff's Office when investigated in 1991.

CONCLUSION

Plaintiff's motion for partial summary judgment on the issue of liability is granted. I find that plaintiff's relationship with her domestic partner qualifies as a family and therefore is entitled to an intermediate standard of review. Intermediate scrutiny requires that governmental rules that restrict constitutional behavior be tailored in an reasonable manner to serve a substantial state interest. Defendant's work rule fails to be reasonably tailored to serve the state's interest of security and protection of the jail facility. Moreover, even if defendant's work rule is examined under the rational relation standard of review, I find no rational connection between the rule and the promotion of safety of persons and property. Defendant's motion for summary judgment is denied.

Dated this 23 day of August, 1993.

/ James A. Redden
United States District Judge

[filed October 12, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KIM REUTER,	)	
Plaintiff	)	Civil No. 92-1622 RE
vs.	)	
BOB SKIPPER,	)	PERMANENT INJUNCTION
	)	AND DECLARATORY
Defendant.	)	JUDGMENT
	)	

Plaintiff in the above-entitled action commenced an action against defendant, the Sheriff of Multnomah County, and sought monetary and equitable relief against defendant including a declaration that her constitutional rights have been violated and a permanent injunction barring the termination of her employment as a correctional officer based upon the enforcement of W1.100.110, either in its original form or as amended on or about November 20, 1992.

After hearing on the parties' cross-motions for summary judgment on the issue of liability and after considering the affidavits submitted with those motions and the testimony offered by the parties in open court, it appears to the court that defendant is committing acts, and is about commit acts as set forth in plaintiff's complaint, and will continue to do so unless restrained by order of this court, and that immediate and irreparable injury will result to plaintiff as a result of the enforcement of defendant's work rule against her.

IT IS ORDERED, ADJUDGED, AND DECREED that defendant Bob Skipper, Sheriff of Multnomah County, his successors in office, agents, representatives, employees,

attorneys, and all other persons in active concert and participation with them, be and hereby are permanently enjoined and restrained from in any manner enforcing against plaintiff W1.100.110 based upon her association with her domestic partner.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that W1.100.110, either in its original form or as amended on or about November 20, 1992, is declared to be violative of the First and Fourteenth Amendments to the Constitution of the United States and is void to the extent that said work rule interferes with family relationships of correctional officers.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiff shall be returned immediately to active duty in her position as a correctional officer without any loss of seniority, benefits or pay as a result of the enforcement of W1.100.110 against her.

Plaintiff is entitled to her costs and reasonable attorney fees incurred in this matter.

The court shall maintain jurisdiction of this case in order to enforce the injunction issued herein.

DATED this 8 day of October, 1993.

/ James A. Redden
United States District Judge

Presented by:

/ Spencer M. Neal
Of Attorneys for Plaintiff